DEPARTMENT OF INDUSTRIAL RELATIONS

INITIAL STATEMENT OF REASONS FOR

PROPOSED ACTION TO AMEND

CALIFORNIA CODE OF REGULATIONS, TITLE 8, CHAPTER 8, SUBCHAPTER 4

SECTIONS 16421 through 16439.

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NOTICE OF PROPOSED ACTION BY THE DIRECTOR OF
INDUSTRIAL RELATIONS TO ADOPT AND AMEND
REGULATIONS GOVERNING LABOR COMPLIANCE PROGRAMS

INITIAL STATEMENT OF REASONS

The Director of the Department of Industrial Relations ("Director") proposes to adopt and amend regulations governing the approval and operation of Labor Compliance Programs by state and local agencies involved with public works construction contracts. The existing regulations are found in Subchapter 4 of Chapter 8, commencing with Section 16425, of Title 8 of the California Code of Regulations. These proposals will add and renumber certain regulations so that Subchapter 4 of Chapter 8 will now commence with Section 16421 of Title 8 of the California Code of Regulations.

GENERAL INFORMATION

The laws regulating public works projects require among other things that contractors and subcontractors pay employees not less than the general prevailing wage rates as determined under the Labor Code. These laws are enforced by the State Labor Commissioner and by state and local agencies operating their own Labor Compliance Programs.

In 1992 the Director of Industrial Relations adopted regulations pertaining to the approval and operation of Labor Compliance Programs by Awarding Bodies that wish to handle their own prevailing wage enforcement and enjoy the broader exemption from prevailing wage requirements found in Labor Code §1771.5(a). These regulations are found at 8 CCR §§16425 – 16439, and up to about 10 programs operated under these rules prior to 2003. The Director now proposes to amend these regulations in light of series of recent legislative changes which revamped the system for hearing prevailing wage disputes and which greatly expanded the circumstances under which Awarding Bodies not only may but must have Labor Compliance Programs to enforce prevailing wage requirements.

Labor Code §§1771.7 and 1771.8 now require an Awarding Body to operate a Labor Compliance Program in order to spend certain bond construction money that was approved by the voters in 2002. These particular statutes also added two concepts that were not clearly contemplated in the original standards governing Labor Compliance Programs: (1) the operation of a limited Labor Compliance Program for bond money projects only that would not enjoy the exemption provided by Labor Code §1771.5(a); and (2) contracting out with a third party to operate a Labor Compliance Program on behalf of the Awarding Body.

In addition to proposing appropriate modifications to the regulatory language, these proposals also reorganize the sections somewhat to put them in a more logical order. Former §16430 [Components of Labor Compliance Program] has been moved to the beginning, where it is now §16421, with additional language pertaining to programs operated by contract with a

private entity. A new §16423 is added to reflect specific limitations and requirements from the bond statutes. There are now two rules pertaining to the initial approval of a Labor Compliance Program, one for the traditional model of an Awarding Body operating its own program (new §16425, which is an amended version of the formerly §16426), and one for a third party entity that operates a Labor Compliance Program by contract with an Awarding Body (new §16426). The amendments in the later enforcement sections (16434 – 16439) are primarily to clarify terminology and reflect changes in the hearing and review system following the adoption of AB 1646 in 2000.

PROPOSED AMENDMENTS

The Director proposes to amend, repeal, adopt and renumber the sections within Subchapter 4 of Chapter 8, Title 8 of the California Code of Regulations. Subchapter 4 currently commences with §16425 and concludes with §16439. Under these proposals, Subchapter 4 would commence with §16421 and conclude with §16439. The following statements apply to all of the proposed amendments unless otherwise indicated.

- With regard to the status of private entities that operate a Labor Compliance Program under contract with a public agency, the Director of Industrial Relations has obtained an opinion letter from the Fair Political Practices Commission [File No. A-03-107 Aug. 7, 2003] indicating that key personnel who operate the program would be regarded as "public officials" under Government Code §82048 and 2 Cal.Code Reg. §18701(a)(s)(A), thus making them subject to relevant conflict of interest and disclosure requirements. The Director of Industrial Relations has relied on this opinion in drafting these proposals.

- With the exception of the FPPC opinion letter noted immediately above, the Director of Industrial Relations did not rely upon any other technical, theoretical, or empirical studies, reports, or similar documents in making these proposals. The Department did consult additional legal authorities (case law, statutes, and regulations) to ensure that these proposals meet applicable legal standards.

- No reasonable alternatives were identified by the Director of Industrial Relations nor have any reasonable alternatives been identified and brought to the attention of the Director as of the time these amendments were proposed.

- None of the proposals mandates the use of specific technologies or equipment.

- These proposals directly impact only those state and local agencies that choose to operate a Labor Compliance Program, including those who do so in order to obtain certain bond funding for public works construction projects. The Director believes that these proposals impose no significant mandates, costs, or savings that are different or distinct from what the Legislature has required by statute.

- For the sake of clarity, these proposals spell out the term "Labor Compliance Program" wherever it appears in the regulations rather than using the abbreviation "LCP."

- The purpose of changing some of the numbers and the order of some of the regulations is to put the regulations in a more logical order, starting with general composition and progressing through the application and approval process and then to ongoing responsibilities. The purpose of amending the titles of two of the Articles and several of the sections is to reflect their contents more accurately.

The purposes of the proposed amendments to what will be a new *section 16421* [current section 16430] are to (1) to include in subparagraphs (a)(1) and (a)(2) references to "Design-Build" requests and contracts among the specified requirements for a Labor Compliance Program in accordance with the definition of "public works" in Labor Code §1720(a) and an enumerated requirement in new Labor Code §1771.7; (2) delete an unnecessary and confusing sentence from subparagraph (a)(3) regarding an Awarding Body's creation of its own certified payroll reporting form; and (3) add a new subsection (b) to specify that when an approved private entity contracts to operate a Labor Compliance Program on behalf of an Awarding Body, that private entity has the same legal rights and responsibilities as the public Awarding Body, including with respect to the handling of information and compliance with conflict of interest reporting requirements. The reason and necessity for the new subsection is to clarify that a private entity and its personnel who operate an approved Labor Compliance Program on behalf of a public agency Awarding Body (as now expressly authorized under Labor Code §§1771.7 and 1771.8) stand in the shoes of that Awarding Body. The handling of personnel information and payroll records and compliance with conflict of interest reporting requirements administered by the Fair Political Practices are the types of public agency responsibilities that will regularly confront a private entity that contracts to operate a Labor Compliance Program.

The purpose of the proposed amendments to what will be a new *section 16422* [current section 16425] is to make minor clarifying grammatical changes in subsections (a), (b), and (c), and to spell out Labor Compliance Program wherever the initials "LCP" appear, and to change the initials "DLSE" to "Labor Commissioner" (referring to the Chief of the Division of Labor Standards Enforcement or DLSE) in subsection (e)(2) to make this terminology consistent with related statutes and regulations. No substantive change in the existing regulation is intended.

The purpose of the proposed new *section 16423* is to take the statutory obligation to operate a Labor Compliance Program as a condition for using certain bond funding and to (1) restate it as a prohibition against using specified bond funds unless the Awarding Body operates an approved Labor Compliance Program; (2) specify that an approved labor compliance means one that complies with specified statutory requirements and has been approved by the Director of Industrial Relations under these regulations; (3) require a written finding as evidence that the Awarding Body has established or has contracted for the operation of a Labor Compliance Program; and (4) clarify that the limited prevailing wage exemption found in Labor Code §1771.5(a) applies only to an Awarding Body that operates a Labor Compliance Program for all of its public works projects rather than just for bond-funded projects for which a Labor Compliance Program is required. The reason and necessity for this proposal is to clarify a

number of questions raised with respect to the new bond-funding statutes. First, it clarifies the duty to have a Labor Compliance Program for specified bond-funded projects, enumerating the various sources of this requirement in a single rule (and contemplating that there may be future additions to the list). Second, it clarifies that a Labor Compliance Program must be approved by the Director of Industrial Relations, which has been required under existing law and regulations since 1992 but was not expressly stated in the new bond-funding statutes. Third, it takes the "finding" requirement that appears in Labor Code §1771.7 but not §1771.8 and applies it across the board so that there will be clear evidence that an Awarding Body has established a Labor Compliance Program and thus may qualify for the specified bond funding. Fourth, it clarifies that the pre-existing limited exemption from paying prevailing wages (projects up to $15,000 or $25,000) does *not* apply to an Awarding Body that establishes a Labor Compliance Program only for the specified bond-funded projects.

There is no section 16424, which is reserved for later use.

The purpose of the proposed amendments to renumbered *section 16425* [current section 16426] is to spell out the term Labor Compliance Program wherever the initials "LCP" appear, to specify in subparagraph (a)(1) that the relevant experience of program personnel may have been acquired in related private sector work, and to specify in subparagraph (a)(5) that the program's legal support must be "competent," meaning with some demonstrable aptitude for prevailing wage enforcement. The reason and necessity for the amendments is to set forth certain standards of evaluation consistent with current practice. No substantive change in practice under the existing regulation is intended.

The purpose of the proposed new *section 16426* is to set forth an alternative set of evaluation standards for a third party entity that seeks approval to operate a Labor Compliance Program by contract with an Awarding Body. This new section uses the existing standards for an Awarding Body operating its own Labor Compliance Program [current section 16426, which is being renumbered 16425 above] and adds additional criteria pertinent to the evaluation of a private entity as follows: (1) in subparagraph (a)(2) a specification of where the program intends to operate; (2) in subparagraphs (a)(3) and (5), information disclosing potential conflicts of interest among program personnel and legal counsel who may have been working for or representing other entities with distinct interests in public works contracts; and (3) in subparagraph (a)(8) an awareness of specified public responsibilities and procedures to insure compliance. The purpose of subsection (e) is to provide a mechanism for extending program approval to other Awarding Bodies with whom the third party program contracts and to withdraw such approval when warranted. The reasons and necessity for this regulation is to address the new circumstance of approving third party program providers in light of the new authority found in Labor Code §§1771.7 and 1771.8 for an Awarding Body to "contract for" the operation of a Labor Compliance Program. Restating this as a separate regulation makes it easier to understand which evaluation standards apply than would be the case if these third party requirements were grafted onto the existing regulation.

The purpose of the proposed amendments to *section 16427* is to (1) spell out Labor Compliance Program wherever the initials "LCP" appear; (2) spell out the number "eleven" in subsection (a); (3) change the term "Awarding Body" to applicant in subsections (a), (b), and (c)

in recognition of the two types of applicants for approval; and (4) change the term "Awarding Body" to "Labor Compliance Program" in subsection (d) in recognition that it is the program rather than the Awarding Body that obtains approval. The reason and necessity for these amendments to clarify terminology in a manner consistent with other proposed changes. No substantive change in the existing regulation is intended.

The purpose of the proposed amendments to *section 16428* is to (1) spell out Labor Compliance Program wherever the initials "LCP" appear and substitute the term Labor Compliance Program for "Awarding Body" wherever the term refers to the program and not its sponsoring agency; (2) renumber subsection (a) in a more logical manner; (3) add two new grounds for revocation of approval, specifically for a pattern of having determinations reversed in prevailing wage hearings under Labor Code §1742(b) or of not meeting hearing requirements or failure to comply with record handling and conflict of interest disclosure requirements; and (4) make nonsubstantive clarifications of the language in subsections (b)(3) and (c). The reason and necessity for the amendments adding additional grounds for revocation of approval is to ensure that programs make proper determinations and competently defend those determinations on appeal and also that private entities comply with conflict disclosure and record handling requirements as a condition for maintaining their certification to operate. The reason and necessity for the other amendments is to clarify terminology in a manner consistent with other proposed changes.

The purpose of the proposed amendments to *section 16429* is to spell out Labor Compliance Program wherever the initials "LCP" appear and to clarify language in subsection (b) in a manner consistent with other proposed amendments. No substantive change in the existing regulation is intended. The proposed amendments will also make section 16429 part of Article 2, where by title and content it more logically belongs. The proposed amendments will then change the title of Article 3 to "Reports and Audits" to more accurately reflect its contents.

Current section 16430 is being moved to the front and renumbered as section 16421. There is no replacement text for section 16430, which will be reserved for future use.

The purpose of the proposed amendments to *section 16431* is to (1) make the language of subsection (a) more understandable; (2) add clarifying language to subparagraphs (a)(1) and (a)(2) so that they remain applicable and understandable for third party programs; (3) require private program operators to provide ongoing certification of compliance with conflict disclosure requirements; and (4) substitute and spell out the term Labor Compliance Program where appropriate. The reason and necessity for these amendments to ensure that third party program operators will meet reporting requirements from which they might otherwise appear excepted under the current language and continue to provide information needed for performance monitoring by the Director of Industrials Relations.

The purpose of the proposed amendments to *section 16432* is to substitute Labor Compliance Program for Awarding Body in subsection (a) and spell out that term in subparagraph (a)(1). The reason and necessity for these amendments to clarify terminology in a manner consistent with other proposed changes. No substantive change in the existing regulation is intended.

The purpose of the proposed amendments to *section 16433* is to clarify the language in subpart (a) which specifies the applicability of the limited exemption from prevailing wage requirements provided by Labor Code §1771.5(a), and to add "installation" to the enumeration of project types in subpart (b). The reason and necessity for the amendment to subpart (a) is to clarify the applicability of the exemption in light of the creation of new project specific Labor Compliance Programs under Labor Code §§1771.6 and 1771.7 which would not enjoy the exemption. The reason and necessity for the amendment to subpart (b) is to incorporate terminology added by a 2001 amendment to Labor Code §1720(a)(1). *Stats. 2001, Chap. 938, §2 (SB 975).*

The purpose of the proposed amendments to *section 16434* is to clarify the language in subpart (a) and to add a new subpart (b) specifying a Labor Compliance Program's responsibilities with respect to apprenticeship programs. The reason and necessity for the proposed amendments to subpart (a) is to make the language clearer and more understandable without changing the substantive meaning. The reason and necessity for subpart (b) is to collect, clarify, and highlight a distinct set of responsibilities relating to apprenticeship standards, some of which are enforced by the Division of Apprenticeship Standards rather than by Labor Compliance Programs or the Labor Commissioner.

The purpose of the proposed amendments to *section 16435* is to (1) delete an incongruous and unnecessary sentence from subsection (a); (2) include "Design-build" among the specified types of contracts in subsection (b); (3) substitute the term Labor Compliance Program for Awarding Body and include subcontractors among those entitled to notice in subsection (d)(3); and (4) incorporate current section 16435.5 as a new subsection (e). The reason and necessity for these amendments is to make the language more understandable and less cumbersome without changing the substance. In particular, the existing use of two regulations for withholding depending on types of violations is unnecessary and confusing given the cross-referencing required between the two. The reason and necessity for the additional duty to give subcontractors notice under subsection (d)(3) is to make the requirements consistent with recent changes to Labor Code §§1741 – 1743 and 1771.6, which extended rights to affected subcontractors to seek review of prevailing wage determinations. The reason and necessity for deleting the second sentence of subpart (a) is because it is now superfluous to and possibly inconsistent with Labor Code section 1771.6(a), which now requires that contractors and subcontractors receive the same notice for subcontractor violations.

The purpose of the proposal to delete current *section 16435.5* and incorporate it as a new subsection (e) in section 16435 is explained in the preceding paragraph.

The purpose of the proposed amendments to *section 16436* is to (1) substitute the term Labor Compliance Program for Awarding Body in subsection (a); (2) delete confusing and superfluous language in subsections (a) and (b); and (3) to revise statutory references in subsections (b) and (b)(1) to reflect recent changes in the law pertaining to the appeal of a Labor Compliance Program's Notice of Withholding (Labor Code §1771.6) and defined "per diem wages" (Labor Code §1773.1). The reason and necessity for this rule is to make the language consistent with recent legislation.

The purpose of the proposed amendments to *section 16437* is to (1) spell out Labor Compliance Program wherever the initials "LCP" appear; (2) request specific dates rather than a calculated date in subparagraph (a)(1); (3) include "subcontractor" wherever the term "contractor appears; (4) revise the language of subparagraphs (a)(6) and (a)(7) to conform with recent amendments to Labor Code §1775(a) revising the standard for adjusting penalties for prevailing wage violations; (5) revise the specified deadlines in subsection (b) for transmitting the file or report to the Labor Commissioner (for review and approval of forfeitures) to conform with recent statutory amendments; (6) delete a confusing notice requirement in subsection (c) that has been superseded by newer requirements in Labor Code §1771.6(a) and 8 Cal.Code Reg. §17220 et seq.; and (7) delete a confusing alternative deadline in subparagraphs (e)(1) and (e)(2) for the Labor Commissioner to approve a forfeiture. The reason and necessity for these proposals is to bring the language into conformity with 2000 amendments to several prevailing wage statutes, which among other things revised the system for reviewing prevailing wage determinations, extended direct review rights to subcontractors, and revised standards for adjusting penalties for prevailing wage violations. *(Stats. 2000, Chap. 954 [AB 1646].)* The reason and necessity for revising dates and deadlines is remove calculations based on statutes that were superseded by the same legislation and also to make the information more straightforward and easier to determine.

The purpose of the proposed amendments to *section 16438* is to (1) clarify procedures relative to handling of forfeited funds, including by adding references to administrative proceedings through which prevailing wage disputes are now heard; (2) distinguish between Labor Compliance Programs and Awarding Bodies consistent with the other proposals above; (3) give the Hearing Officer in a prevailing wage appeal under Labor Code §1742(b) the authority to allocate fine, penalties, and forfeitures between the Awarding Body and Labor Commissioner when both are parties; and (4) substitute the word "penalties" for "amounts" in subsection (c) to specify the Labor Commissioner's entitlement to keep the penalties but *not* wages when the Awarding Body is not a party. The reason and necessity for these proposals is to clarify the proper allocation and handling of forfeitures in light of the recent statutory amendments changing the procedures for seeking review of prevailing wage determinations and also authorizing Awarding Bodies to contract for the operation of Labor Compliance Programs.

The purpose of the proposed amendments to *section 16439* is to completely revise the language and requirements pertaining to the appeal of Labor Compliance Program enforcement actions in order to bring that language into conformity with recent statutory amendments that completely revised the system for seeking review of prevailing wage determinations. (*Stats. 2000, Chap. 954 [AB1646].)* The proposed amendment to subsection (a) cross-references to the relevant statutes and the comprehensive new hearing regulations found at 8 Cal.Code Reg. §§17201-17270 rather than trying to reiterate specified requirements. The purpose of the proposed amendment to subsection (b) is to reiterate the Labor Commissioner's statutory authority to intervene in such a case. The reason and necessity for the proposed amendments is to bring the regulation into conformity with current controlling statutes.